Supreme Court of the United States

October Term, 1965
No. 745

ABRAHAM MOSKOW *ET AL.*,
Petitioners,

vs.

BOSTON REDEVELOPMENT AUTHORITY *ET AL.*,
Respondents.

BRIEF OF CITY OF BOSTON AND ITS CITY COUNCIL OPPOSING PETITION FOR WRIT OF CERTIORARI

Introductory Statement.

The petition herein (p. 1) prays that "a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts entered in the above-entitled case on August 17, 1965." Rule 21 (1) of this Court requires that the transcript of the record filed with a petition for a writ of certiorari include "the proceedings in the court whose judgment or decree is sought to be reviewed". In this case, those proceedings included the filing of briefs. Since copies of such briefs have not been included in the transcript filed by the petitioners, respondents submitting this brief are, pursuant to Rule 21 (6), filing as additional record a duly certified copy of the petitioners' brief because of its importance in establishing how they presented the case to the Supreme Judicial Court of Massachusetts.

Argument.

Paraphrased, the question presented by the petition at bar is whether, in this proceeding in equity for declaratory relief, the Supreme Judicial Court of Massachusetts denied the petitioners due process of law when, after reversing interlocutory decrees sustaining demurrers and a final decree dismissing the bill, the Supreme Judicial Court ordered a final decree making a declaration unfavorable to the petitioners without further opportunity to be heard.

The appeal from the final decree dismissing the bill (R. 23) brought the whole case to the Supreme Judicial Court. *Merchants Mutual Casualty Co.* v. *Leone*, 298 Mass. 96, 100.

Even a cursory examination of the brief filed in the Supreme Judicial Court of Massachusetts by the petitioners will disclose that the question whether a declaration favorable to the petitioners could be made on the averments set forth in the petitioners' bill was argued at length before that Court. Since in the opinion of that Court no declaration in favor of the petitioners could be made on those averments, there was no occasion for a further opportunity to be heard. *Willcutt* v. *Prescott*, 340 Mass. 532, 535.

In this Court, the petitioners (Petition, p. 12) rely on *Saunders* v. *Shaw*, 244 U. S. 317, where, as this Court in *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164, observed, the federal claim arose from the *unanticipated* disposition of the case at the close of the proceedings in the state supreme court. In view of the various arguments advanced by the petitioners in their brief in the Supreme Judicial Court of Massachusetts, we submit it is hard to conclude that petitioners did not anticipate that the Supreme Judicial Court of Massachusetts might dispose of the case on the averments in the petitioners' bill. Moreover, this case is quite unlike the *Saunders* case where the state supreme court, admitting

evidence excluded at the trial, decided *for* the plaintiff without permitting the defendant to offer testimony to rebut the evidence excluded by the trial court. In the case now at bar, the Supreme Judicial Court of Massachusetts decided *against* the petitioners on their own averments. The action of the Massachusetts court in this case may be likened to a state court's entering judgment against a plaintiff upon plaintiff's opening statement to a jury. It would seem elementary that such action does not deprive a plaintiff of due process of law. "Due process of law is not concerned with mere afterthoughts." *Helis* v. *Ward*, 308 U. S. 365,370.

The petition at bar (p. 12) also relies on *Reynolds* v. *Stockton*, 140 U. S. 254, and *Hovey* v. *Elliott*, 167 U. S. 409. In the *Hovey* case (p. 446), this Court recognized that the *Reynolds* case concerned a decree which "passed upon questions not at issue in the cause, and was rendered against a party who had taken no actual part in the litigation subsequent to the filing of his answer." In the *Reynolds* case itself, this Court had noted (p. 266) that it was not there concerned with a case "in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter." The *Reynolds* case is thus not in point at bar, we submit, because it is apparent from the petitioners' brief in the Supreme Judicial Court of Massachusetts that the petitioners actually litigated whether a declaration favorable to the petitioners could be made on the petitioners' averments.

In *Hovey* v. *Elliott*, 167 U. S. 409, this Court perceived (p. 446) "no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party [the *Reynolds* case], and rendering a decree by refusing to permit a defendant to be heard in his

defence or to consider the merits of a sufficient defence, and, indeed, by striking the pleading containing such defence from the files" [the *Hovey* case]. The *Hovey* case was, to use the language of this Court in *Societe Internationale* v. *Rogers*, 357 U. S. 197, 209, "substantially modified" by *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 349–351, where, to employ the language of this Court in the *Societe Internationale* case (p. 210), this Court ruled that "a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order." Even without this modification, however, the *Hovey* case is readily distinguishable from the case at bar where it is clear from the decision of the Supreme Judicial Court of Massachusetts (Petition, pp. 19–29) that it heard the petitioners on every point they advanced to show that a declaration favorable to them should be made on the averments in their bill.

In closing, we invite attention to a statement made by this Court in *Allen* v. *Georgia*, 166 U. S. 138, and quoted with approval in *Hovey* v. *Elliott*, 167 U. S. 409, 443, and also in *Wilson* v. *North Carolina*, 169 U. S. 586, 593–594: "To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pur-

sued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference." 166 U. S. 138, 140–141.

Conclusion.

In view of the matters hereinbefore set forth, it is submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIAM H. KERR,
City of Boston Law Dept.,
11 Beacon Street,
Boston, Massachusetts 02108,
Attorney for the City of Boston and Christopher I. Iannella, George F. Foley, William J. Foley, Frederick C. Langone, John J. Tierney, Jr., Barry Hynes, John E. Kerrigan, Peter F. Hines and Katherine Craven as they constitute the City Council of the City of Boston.

Of Counsel:

ARTHUR G. COFFEY,
Corporation Counsel of the City of Boston.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 745.

ABRAHAM MOSKOW ET AL.

v.

BOSTON REDEVELOPMENT AUTHORITY ET AL.

BRIEF ON BEHALF OF THE DIRECTOR OF THE DIVISION OF URBAN RENEWAL OF THE DEPARTMENT OF COMMERCE AND DEVELOPMENT OF THE COMMONWEALTH OF MASSACHUSETTS AND ON BEHALF OF SAID DIVISION IN OPPOSITION TO REVIEW BY CERTIORARI.

EDWARD W. BROOKE,
Attorney General,
By David Berman,
Assistant Attorney General,
State House,
Boston, Massachusetts 02133.

ADDISON C. MITCHELL & SON, INC., LAW PRINTERS, BOSTON.

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BRIEF ON BEHALF OF THE DIRECTOR OF THE DIVISION OF URBAN RENEWAL OF THE DEPARTMENT OF COMMERCE AND DEVELOPMENT OF THE COMMONWEALTH OF MASSACHUSETTS AND ON BEHALF OF SAID DIVISION IN OPPOSITION TO REVIEW BY CERTIORARI.

Citations to Opinions Below.

This topic is adequately presented in the petition.

Jurisdiction.

For reasons to be discussed in this brief, this Court lacks jurisdiction under 28 U.S.C. § 1257 (3), or any other provision of law to review the decision of the Supreme Judicial Court.

Questions Presented.

Two questions will be presented in this brief:

1. May a Court of competent jurisdiction considering a bill for declaratory relief brought pursuant to a state declaratory judgment statute enter a final decree terminating the controversy against the plaintiffs if, taking all the allegations of the bill as true, the Court is persuaded that the plaintiffs are not entitled to the declaration prayed for?

2. Even if it is assumed, *arguendo*, that the first question ordinarily should be answered in the negative, is the question rendered irrelevant by application of the principle that a Court may refuse to review a determination by duly constituted public bodies taking certain land for purposes of urban renewal?

Constitutional Provision Statute and Rules Involved.

This topic is adequately presented in the petition.

Statement.

On September 11, 1964, Abraham Moskow and others (hereinafter "petitioners") filed a bill for declaratory relief [1] in the Superior Court of Massachusetts (R. 11). The bill was prolix, ambiguous, and complicated. Nevertheless, its essential allegations may be summarized as follows:

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[1] Four companion cases were begun almost simultaneously: No. 13,348 and No. 13,349, petitions for common-law certiorari against the City Council of Boston, John J. Carney, and the Boston Redevelopment Authority; No. 6622, a statutory bill in equity; and No. 6623, a petition for judicial review under the Massachusetts Administrative Procedure Act. (The case numbers used in this footnote are those assigned by the Supreme Judicial Court.) The petitioners do not seem to petition for review of these cases, and accordingly they will not be discussed in this brief.

1. The petitioners are owners of property at 10 State Street in Boston (R. 2).

2. On July 23, 1964, the Boston Redevelopment Authority (hereinafter the Authority), a body politic and corporate, took the property at 10 State Street by right of eminent domain (R. 2).

3. The Boston City Council (hereinafter the Council) and the Division of Urban and Industrial Renewal [2] of the Department of Commerce (hereinafter the Division) ostensibly approved the plan (pursuant to which the petitioners' property was taken) on May 25, 1964, and June 24, 1964, respectively. These approvals, however, were not "valid," because hearings held by these bodies were not "full and fair hearings conducted judicially or quasijudicially" (R. 5), and the plan as approved failed to conform to a general plan for the municipality as a whole and violated applicable zoning ordinances (R. 9). Additionally, three members of the Council should have disqualified themselves from voting on the taking because all three had publicly pledged themselves to approve the plan. Two of these three had received "compensation" for their pledges, and, as to the third, a member of his immediate family "was conducting a funeral home" which he was "seeking to relocate . . . within the Area" (R. 7).

4. Although the taking was ostensibly for a public purpose, the petitioners' property was not within a decadent, blighted, or substandard area, and in fact the primary purpose of the taking was to mollify the New England Merchants National Bank. The Authority had indicated that it needed the Bank's nearby property to facilitate access to the Government Center

[2] Its name has been changed by Mass. St. 1964, c. 636, § 6, to the Division of Urban Renewal. See n. 4 of the opinion of the Supreme Judicial Court.

> Project.[3] The Bank disagreed. However, after negotiation among "representatives" of the Bank, the Authority and various other persons, an "understanding" was reached. The terms of this "understanding" were that the Bank would attempt to purchase the petitioners' property and, if the petitioners refused to sell, the Authority would take the property, and the Bank, by one means or another, would obtain the use of this land for an office building. In view of this "understanding" the Bank withdrew its objection to the taking of its own property to facilitate access to the project (R. 3-5).

In their bill the petitioners prayed (*inter alia*) that on the foregoing facts the taking of their property be adjudged "illegal and nullity" (R. 10).

To the bill all the defendants demurred (R. 11, 14, 16, 18, 21), and all demurrers were sustained (R. 12, 14, 17, 19, 21). From interlocutory appeals sustaining the demurrers the plaintiffs appealed to the Supreme Judicial Court (R. 13, 15, 18, 20, 22). The case, together with its companions, was argued on April 9, 1965, and decision was handed down on August 17, 1965. *Moskow* v. *Boston Redevelopment Authority,* 1965 Mass. Adv. Sh. 1203.

Mr. Chief Justice Wilkins's opinion considered the allegations of the bill at length. Quoting from *Comerford* v. *Meier,* 302 Mass. 398, 402, he said (p. 1211):

> "No intendment in favor of the pleader can be made upon a demurrer. *It admits allegations of fact well pleaded* but does not admit inferences from such facts

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[3] The bill makes no effort to describe clearly the geographical relationship of this project to the petitioners' property or to that of the Bank. Actually, the petitioners' property is contiguous with the property taken for the project (R. 5-6).

unless they are necessary inferences. It does not admit conclusions of law from facts averred." (Emphasis supplied.)

Taking the allegations as true, the Supreme Judicial Court held that there was a controversy between the plaintiffs and the defendants except for the Bank and one Andrew Hunter,[4] whose demurrers were sustained (p. 1218). As to the other defendants, the Court overruled their demurrers, but, finding that facts alleged in the bill did not support the conclusion that the taking was illegal or nullity, ordered the entry of a negative declaration (p. 1218).

After rescript from the Supreme Judicial Court, the petitioners applied to this Court for a stay of proceedings that would in effect have prevented the Boston Redevelopment Authority from continuing further with its plans for the petitioners' property pending filing and determination of a petition for certiorari.[5] Mr. Justice Clark turned down this application with the notation: "Under *Berman* v. *Parker*, I see no merit in the contention. See 348 U.S. 26, 34-35."

The petitioners in that application did not attack the state decision on any substantive federal grounds; they contended merely that the decision ordering the declaration on their pleading violated the requirements of due process of law embodied in the Fourteenth Amendment to the

---

[4] Since no answer was filed by any of the defendants, the Court may well have concluded that the failure of the defendants, except for Hunter and the Bank (R. 19, 21), to raise in their demurrers any question as to the existence of a controversy constituted an admission that there was a controversy between the plaintiffs and these parties. *Woods* v. *Newton*, 1965 Mass. Adv. Sh. 989, 995.

[5] This stage of the proceedings, of course, does not appear in the record from the Supreme Judicial Court, but, presumably, is a proper matter for judicial notice by this Court. Wigmore on Evidence, § 2579 (p. 570, v. IX) (3d Ed.).

United States Constitution. This is the sole contention of their present petition.

Argument.

I. THE GROUND ARGUED BY THE PETITIONERS TO OBTAIN REVIEW BY CERTIORARI IS WITHOUT MERIT BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS RAISED; THE RESCRIPT FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS ORDERING THE SUPERIOR COURT TO ENTER A DECLARATION ON THE PETITIONERS' BILL DOES NOT VIOLATE ANY CONCEIVABLE REQUIREMENT OF DUE PROCESS OF LAW OR ANY OTHER PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

The Supreme Judicial Court of Massachusetts, interpreting the Massachusetts "Procedure for Declaratory Judgments" (adapted from the Uniform Declaratory Judgment Act), G.L. c. 231A, frequently has stated that, on a bill for declaratory relief, the trial Court should not sustain a demurrer merely because it disagrees with the proposition for which the petitioner contends, but should enter a negative declaration. In addition to the cases cited by the Court on page 19 of its opinion, this proposition has also been stated in *School Committee of Cambridge* v. *Superintendent of Schools of Cambridge,* 320 Mass. 516, 520; *Burnes* v. *Metropolitan District Commission,* 325 Mass. 731, 735; *Zaltman* v. *Daris,* 331 Mass. 458, 462; *Morgan* v. *Banas,* 331 Mass. 694, 698; *James Construction Co., Inc.,* v. *Commissioner of Public Health,* 336 Mass. 143, 145; and *Stow* v. *Pugsley,* 1965 Mass. Adv. Sh. 925, 926.[6] It may be that normally a bill for declaratory relief, taken as true, would be insufficient to show that the petitioner is *not* entitled to the declaration requested. In such cases the filing of an

[6] This is only a partial list of cases in which the proposition has been set forth.

answer and the hearing of evidence would be necessary. See, *e.g.*, *School Committee of New Bedford* v. *Commissioner of Education*, 1965 Mass. Adv. Sh. 1029, 1030-1031. In cases, however, in which the petitioner's bill, taken as true, does not set forth a cause for the issuance of the declaration sought therein, the Court may issue a negative declaration on the face of the pleadings. *Willcutt* v. *Prescott*, 340 Mass. 532, 535.[7] The same rule is followed in certain other jurisdictions. *Essick* v. *Los Angeles*, 34 Cal. 2d 614, 624-625. *Cherryvale* v. *Wilson*, 153 Kan. 510, 511. *German Masonic Temple Assoc.* v. *New York*, 279 N.Y. 452, 457. *Cabell* v. *Cottage Grove*, 170 Ore. 256, 261-262. *Cf. Anderson* v. *Wyoming Redevelopment Co.*, 154 P. 2d 318, 337 (Wyo.): demurrer sustained in case in which Massachusetts probably would have ordered negative declaration.

Of course, in declaratory-judgment cases in which the pleadings show that the petitioner is not entitled to relief, whether a demurrer is sustained or a so-called "negative" declaration is made is purely a matter of state procedure. Either alternative reflects the established precept of Anglo-American law that courts need not hear evidence on matters which can be decided on pleadings. *Souffront* v. *La Compagnie des Sucreries de Porto Rico*, 217 U.S. 475, 487. *Fishburne* v. *Merchants Bank of Point Townsend*, 42 Wash. 473, 476. *First National Bank of Wellston* v. *Conway Road Estates Co.*, 94 F. 2d 736, 738. See 41 Am. Jur. § 335, for collected cases. A similar rule is embodied in Rule 12(c) of the Federal Rules of Civil Procedure. The purposes of the rule are self-evident.

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[7] The petitioners (p. 10) attempt to distinguish *Willcutt* v. *Prescott* by quoting the statement that "there are no facts in dispute." But all that the Court could have meant by that statement was that the defendants had not filed an answer to the plaintiff's bill. Nowhere had the defendant admitted the plainiff's allegations. The record in *Willcutt* v. *Prescott* is printed in Appendix A of this brief.

A case analogous to the case at bar is *Iowa Central Railway Co.* v. *Iowa,* 160 U.S. 389. In that case the Supreme Court of Iowa had granted the plaintiff's motion for an order for judgment on the pleadings, declaring that the defendant's answer "had not shown cause why such order should not be made" (p. 391). This Court answered the contention of the plaintiff in error that due process required a hearing by stating (pp. 393-394):

> "As said by this court, speaking through Mr. Chief Justice Fuller, in *Leeper* v. *Texas,* 139 U. S. 462, 468: 'Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied.' There was a 'regular course of administration' in the case at bar, as that term was employed in the case cited.
>
> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of a State erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it that the averments of an answer set forth no defence to the claim of the plaintiff."

In the present case, as in the *Iowa Central* case, there is no federal question presented under 28 U.S.C. § 1257 (3), involving the procedure followed by the Supreme Judicial Court, and the petition for certiorari must be dismissed.

The petitioners cite the case of *Saunders* v. *Shaw,* 244 U.S. 317, to support their contentions. But that case is

totally inapposite, for there the trial Court had held a hearing on the merits. At that hearing the judge ruled certain of the plaintiff's evidence inadmissible, making it unnecessary for the intervening defendant to present rebutting evidence. Judgment was entered for the defendants,[8] and the state Supreme Court affirmed that judgment. However, on rehearing, that Court decided to accept the evidence which the plaintiff had not been allowed to present at the trial, and thereupon entered judgment for the plaintiff. A second rehearing, sought by the defendants, was denied. This Court reversed, holding that the intervening defendant was entitled under the Fourteenth Amendment to a hearing on his evidence in rebuttal before judgment could be entered against him (p. 319).

No analogy can be drawn between the *Saunders* case and the case at bar. Here evidence was never heard. The petitioners' bill was taken as true and thoroughly examined by the Supreme Judicial Court. The Court decided that the bill did state a controversy against some of the parties. For this reason it reversed decrees sustaining these parties' demurrers. But the Court also found that petitioners' bill *did not* show that they were entitled to the declaration which they sought, but that, in fact, the bill established the contrary proposition. Thus the Court ordered the correct declaration entered. The petitioners now seem to say that due process of law requires that they be given an opportunity to present evidence establishing facts which, if proved, would not entitle them to declaratory, or any other, relief. Or are they saying that they are now entitled to disprove the allegations of their bill and to prove other facts instead? One need not spend time pondering the petitioners' position, for clearly the grounds of their application in this Court are absurd.

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[8] Including the intervening defendant.

II. SINCE MASSACHUSETTS IS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE ANY FORM OF JUDICIAL REVIEW OF AN ADMINISTRATIVE OR LEGISLATIVE DETERMINATION THAT PROPERTY BE TAKEN BY EMINENT DOMAIN FOR PURPOSES OF URBAN RENEWAL, ANY ERROR THAT THE SUPREME JUDICIAL COURT COULD HAVE MADE IN ORDERING THE DECLARATION AGAINST THE PETITIONERS IS HARMLESS.

Let it be assumed, merely for the sake of argument, that generally it would be unconstitutional for a state Court to order a negative declaration against a party who has not been afforded a hearing on the merits. One may still question: Was that party entitled to any judicial hearing at all?

In the instant case the key to the petitioners' entire argument to the Supreme Judicial Court lay in the allegation that "the property at No. 10 State Street . . . [was not] within a decadent, substandard or blighted open area" (R. 3). If this allegation was false, it is abundantly clear that the Authority had power to take the petitioners' property, whatever its motives for doing so may have been. *Despatchers' Cafe Inc.* v. *Somerville Housing Authority,* 332 Mass. 259, 263-264. See *Electronics Corporation of America* v. *City Council of Cambridge,* 1965 Mass. Adv. Sh. 323, 326-327.

The Supreme Judicial Court, however, has said on numerous occasions that the determination of whether particular property is appropriate for slum clearance or urban renewal is a legislative one on which the Courts may not "second guess the Authority." *Moskow* v. *Boston Redevelopment Authority,* 1965 Mass. Adv. Sh. 1203, 1209, and cases cited. On these issues the state law is synonymous with that laid down by this Court in *Berman* v. *Parker,* 348 U.S. 26, 36, which in turn accords with numerous decisions of this Court that neither the states nor the federal government is required to hold a judicial hearing on the

appropriation of private property to achieve a valid social purpose. *Bragg* v. *Weaver*, 251 U.S. 57, 58-59. *Georgia* v. *Chattanooga*, 264 U.S. 472, 483. *United States* v. *Carmack*, 329 U.S. 230, 247, and cases cited in n. 19.

Like this Court (*Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469), the Courts of Massachusetts may not review decisions exclusively within the legislative province. *Attorney General* v. *Pelletier*, 240 Mass. 264, 296. But, if the Court had ordered a hearing on the merits in this case, a judicial inquiry into the appropriateness of the petitioners' property for urban renewal could not have been avoided. It is hardly conceivable that this Court would order state judges to hear an issue which it, itself, would not hear. *Berman* v. *Parker*, *supra*. Since, under the rule of *Berman* v. *Parker*, no judicial hearing was required in this case, any error that may have been committed by the state Court was harmless, and thus the request for review by this Court is without merit. *Wilson* v. *North Carolina*, 169 U.S. 586, 594-596.

Conclusion.

For the foregoing reasons, certiorari should be denied.

EDWARD W. BROOKE,
Attorney General,
By DAVID BERMAN,
Assistant Attorney General.

[Appendix follows.]

Appendix A.

Record in Willcutt v. Prescott, 340 Mass. 532.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Middlesex, ss. EQUITY No. 2524

PRISCILLA WILLCUTT
and
TABER S. WILLCUTT, Petitioners
vs.
OLIVER PRESCOTT, JR., TRUSTEE
GEORGE A. FINGOLD, ATTORNEY GENERAL
WILLIAM B. WILLCUTT, and
MILDRED W. ROBERTS, Respondents

PETITION FOR DECLARATORY RELIEF

TO THE HONORABLE THE JUSTICE OF THE SUPREME JUDICIAL COURT SITTING WITHIN AND FOR THE COUNTY OF MIDDLESEX

Respectfully represents the Petitioners herein that:

1. They are Priscilla Willcutt, of Newton, in the County of Middlesex, and Taber S. Willcutt, of Needham, in the County of Norfolk.

2. The Respondents are Oliver Prescott, Jr., of New Bedford, Bristol County, Massachusetts, Trustee U/W Mary D. B. Hooper, late of Lowell, in the County of Middlesex, George A. Fingold, the Attorney General of the Commonwealth of Massachusetts, and a necessary party to this petition, William B. Willcutt, of Bayside, State of New York, and Mildred W. Roberts, of Boulder, State of Colorado.

3. Mary D. B. Hooper died on March 29, 1924 testate. A copy of her will is attached hereto and marked "A".[1] Paragraph nineteenth of said will provides in part as follows:

> "All the rest and residue of my estate to my trustee to hold and manage as he may determine for the foundation of a home to be situated in the Town of Cohasset, Massachusetts, for the relief of Aged Protestant Couples financially unable to maintain joint domiciles and without children capable of supporting them, such aged couples to be inhabitants of the Towns of Cohasset, Hingham, Scituate, Norwell, Mansfield, Pembroke, Duxbury and Kingston, all in the Commonwealth of Massachusetts. I direct that precedence may be given to such couples who may be inhabitants of the Town of Cohasset. But, if at any time, there are not sufficient aged couples qualified to be admitted to the home from said towns, I direct that others may be admitted from other towns in the County of Plymouth in the discretion of the trustees or such other governing body as may hold the fund hereby created for this purpose.
>
> Said Home to be called the 'Levi Lincoln Willcutt Home for Aged Protestant Couples' as a memorial to the testatrix father."

4. In 1934 a controversy arose between the then trustee and the then heirs-at-law of Mary D. B. Hooper concerning the construction of paragraph nineteenth of said will of Mary D. B. Hooper which controversy was referred to in an agreement of compromise, hereinafter referred to, as follows:

> "whereas under the terms of the will of said Mary D. B. Hooper the trustee holds the residue of the es-

[1] The will was not printed in the record. See page 21 of this brief.

tate in trust for the foundation of a certain home for the relief of aged Protestant couples; and

Whereas the said residue at the present time consists of securities of an approximate value of $156,647; and

Whereas the heirs have asserted and still assert that it is not possible to carry out the terms of the trust, that the Cy pres doctrine is not applicable, and that the trust fund should accordingly now be distributed among them; and

Whereas the trustee disagrees with these contentions claims the right to hold the fund to await further developments, and in the meantime desires to use a part of the income of the fund for the support of aged Protestant couples in their own homes; and

Whereas the parties now desire to effect a compromise of the said claim of the heirs under the authority of G.L. c. 204, par. 14".

5. On April 11, 1934, John H. Clifford, the original trustee, William B. Willcutt, Levi Willcutt, Charles D. Willcutt, Mildred W. Roberts and the Attorney General entered into a compromise agreement which contained a provision that it was to "become effective if and when it has been approved by decree of the Probate Court for Middlesex County or by decree of the Supreme Judicial Court". A petition for leave to effect a compromise pursuant to General Laws, Chapter 204, Section 14, was filed in the Supreme Judicial Court by said John H. Clifford on May 17, 1934, and a copy of such petition and the compromise agreement are attached hereto and marked "B".[2]

6. No guardian ad litem was appointed to represent future contingent interests as required by said General Laws, Chap. 204, Sections 14 and 16; notwithstanding the fact that no guardian ad litem was appointed to represent fu-

[2] The petition, found on pages 7-12 of the record, is omitted.

ture contingent interests a decree approving said compromise agreement was entered on July 7, 1934, and a copy of such decree is attached hereto and marked "C".[3]

7. A home situated in the Town of Cohasset, Massachusetts for the relief of Aged Protestant Couples was not founded by the original Trustee, nor has it been founded by the Respondent Trustee. The residue of the Mary D. B. Hooper Estate has been used for purposes set forth in said compromise agreement. The Respondent Trustee now states that no home for Aged Protestant Couples will be founded.

8. Charles D. Willcutt, Levi Willcutt and Emma W. Fletcher who were three of the then heirs-at-law of Mary D. B. Hooper and were parties to the compromise agreement, have since deceased. Your petitioners are children of Charles D. Willcutt, who died on January 1, 1952. Levi Willcutt died on February 14, 1949, and left children surviving. They are Harriet Willcutt, Jean Willcutt and Mary Willcutt, all of Wellesley, County of Norfolk, Massachusetts. Emma W. Fletcher also died on February 14, 1949, but left no children surviving. The Respondents William B. Willcutt and Mildred W. Roberts are the only surviving heirs-at-law who were parties to the compromise agreement.

9. The compromise agreement entered into by the then heirs-at-law and approved by the Court pursuant to such compromise agreement is not binding on your petitioners for the reason that they were not parties thereto, nor was a guardian ad litem appointed to represent them. Your petitioners had a future contingent interest and should have been represented by a guardian ad litem to comply with the requirements of General Laws Chapter 204, Section 14.

10. Your petitioners contend that the purpose of the trust under Paragraph Nineteenth of the will of Mary D. B.

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[3] This decree, found on page 13 of the Record, is omitted.

Hooper is for the foundation of a home in the Town of Cohasset, Massachusetts, for relief of Aged Protestant Couples and to be called the "Levi Lincoln Willcutt Home for Aged Protestant Couples", as a memorial to the testatrix father. The trust has failed because the specific charitable purpose intended by the testatrix has not been carried out or accomplished thereby terminating the trust and the trust property should now be distributed to the present heirs-at-law of Mary D. B. Hooper as intestate property.

11. An actual controversy has arisen between the parties to this proceeding within the meaning of section 1 of Chapter 231A of the General Laws.

12. Although he has been requested to do so, the Respondent Trustee has failed or neglected to bring a petition for instructions or a proceeding within the meaning of section 1 of Chapter 231A of the General Laws to ascertain

(a) Whether the compromise agreement and decree is binding on the petitioners; and

(b) Whether the charitable trust was specific or general; and

(c) Whether the doctrine of cy pres is applicable and has been legally accomplished.

This petition is brought for that purpose.

13. The petitioners bring this petition in behalf of themselves and all other heirs-at-law of Mary D. B. Hooper, who were not parties to the compromise agreement and who may desire to join therein or who are parties thereto to establish a resulting trust in the trust property held by the Respondent Trustee under paragraph nineteenth of the will of the testatrix.

Wherefore, your petitioners pray:

1. That this Court make a binding declaration that the compromise agreement dated April 11, 1934, and the decree of this Court dated July 7, 1934, approving said compro-

mise agreement did not comply with General Laws, Chapter 202, Sec. 14 and 16, and is not binding on your petitioners.

2. That this Court make a binding declaration that Mary D. B. Hooper under paragraph nineteenth of her will, intended the specific charitable purpose described therein and did not intend any general charitable purpose.

3. That this Court make a binding declaration that the trust under paragraph nineteenth of the will of Mary D. B. Hooper has not been carried out as intended and has failed.

4. That this Court make a binding declaration that the Respondent Trustee now holds the trust property under a resulting trust for the benefit for the present heirs-at-law of Mary D. B. Hooper and is now distributable to them as intestate property of the testatrix.

5. That this Court grant such further relief as to it may seem meet and proper.

PRISCILLA WILLCUTT
TABER S. WILLCUTT
By their Attorneys
William A. Cross
Arthur M. Beale

. . . . . .

DEMURRER TO PETITION FOR DECLARATORY RELIEF.

The respondents Oliver Prescott, Jr., as Trustee under the will of Mary D. B. Hooper, and William B. Willcutt demur to the petition for declaratory relief upon the following grounds:

(a) The petition states no facts forming a basis for a declaratory judgment or degree [*sic*].

(b) It appears by the petition that the subject matter of the petition and the matter as to which a declaratory decree is sought were conclusively settled by the final decree

of the Supreme Judicial Court entered on July 7, 1934, as to all parties having any interest in the residue of the estate of Mary D. B. Hooper.

(c) It appears by the petition that neither of the petitioners is named in the will of Mary D. B. Hooper or was an heir-at-law or next of kin of Mary D. B. Hooper at the time of her death or at the date of the agreement of April 11, 1934, or the entry of the decree on July 7, 1934, and at none of said times did either of them have any interest in the residue of her estate or any future contingent interest in her estate.

(d) It appears that one of the heirs-at-law and next of kin of Mary D. B. Hooper was the father of the petitioners, that he executed a compromise agreement on April 11, 1934, that he was then of full age and sound mind, and that by virtue of the execution of said agreement and the entry of said final decree, he accepted the provisions of said agreement in full satisfaction of all claims with respect to the residuary estate of Mary D. B. Hooper, and that the residue of said estate has been used for the purposes set forth in said compromise agreement.

(e) It appears from the facts alleged in the petition and particularly the decree entered on July 7, 1934, that there was no occasion for appointing a guardian ad litem to represent the petitioners in the proceeding in which final decree was entered by the Supreme Judicial Court on July 7, 1934, approving the compromise agreement set forth in the petition.

By their attorney,

Filed Jan. 28 1957 CLAUDE R. BRANCH

DEMURRER TO PETITION FOR DECLARATORY RELIEF

The respondent, Mildred W. Roberts, hereby demurs to the petition for declaratory relief upon the grounds set

forth in the demurrer of the respondents, Oliver Prescott, Jr., as trustee under the will of Mary D. B. Hooper, and William B. Willcutt.

By her attorney,
CLAUDE R. BRANCH

Filed Apr-1 1957

DEMURRER OF ATTORNEY GENERAL

Now comes Edward J. McCormack, Jr., as he is the Attorney General of the Commonwealth of Massachusetts, and demurs to the petition for declaratory relief on the ground that the petition fails to set forth with substantial certainty sufficient facts which would entitle the petitioners to declaratory relief.

EDWARD J. MCCORMACK, JR., Attorney General
By Richard H. Gens
Assistant Attorney General

Filed in Court April 8 1959 by leave of Court (Ronan, J.) sitting at Boston

CHESTER A. DOLAN JR.

INTERLOCUTORY DECREE SUSTAINING DEMURRERS

This cause came on to be heard and was argued by counsel and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the demurrers of all the respondents be and the same hereby are sustained.

By the Court sitting at Boston, (Ronan, J.)

CHESTER A. DOLAN JR.

Entered: April 23, 1959
(April 27, 1959)

APPEAL OF PLAINTIFFS

Now come the Plaintiffs, in the above entitled cause and make an appeal to Supreme Judicial Court for the Commonwealth from the order of the Court sustaining defendant's demurrers.

By their attorney,
ARTHUR M. BEALE

Filed May 11 1959

FINAL DECREE DISMISSING THE PETITION

The cause came on to be heard at this sitting and was argued by counsel; and thereupon, upon consideration thereof, the Court (Ronan, J.) having sustained the demurrers of the defendants to the petition, it is ordered, adjudged and decreed that the petition be and it now is dismissed.

By the Court, (Spalding, J.)
July 22, 1959

CHESTER A. DOLAN JR.
Clerk.

The petitioners consent to the form of this decree without waiving right to appeal.

ARTHUR M. BEALE
Attorney for the petitioners

Assented to:

EDWARD J. MCCORMACK, JR.,
Attorney General
By Richard H. Gens
Assistant Attorney General

CLAUDE R. BRANCH
Attorney for respondents

APPEAL OF PLAINTIFFS FROM FINAL DECREE

Now come the Plaintiffs in the above entitled cause, and make an appeal to the Supreme Judicial Court for the Commonwealth for the Final Decree Dismissing the Petition of the Plaintiffs.

By their Attorney,
ARTHUR M. BEALE

Filed July 29 1959

AGREEMENT RE PRINTING EXHIBITS ATTACHED TO PLAINTIFFS' PETITION

It is hereby agreed that Exhibit "A" (Will of Mary D. B. Hooper) shall not be printed nor used as an exhibit at the argument before the Full Court; and that Exhibit "B" and "C" attached to Petitioners' Petition shall be printed in the record.

ARTHUR M. BEALE
Attorney for Petitioners
DANIEL F. FEATHERSTON JR.
Attorney for Respondents
EDWARD J. McCORMACK JR.
Atty. General
By Richard H. Gens
Ass't Atty. General.
Attorney General per Hc.

Filed at Boston Oct-7 1959 and approved by the Court (Ronan, J.) sitting at Boston.

The foregoing are true copies.

Attest: CALVIN A. BURGER
Assistant Clerk